

ARKANSAS SUPREME COURT

No. CR 07-263

Opinion Delivered May 3, 2007

ELLIOTT FINCH
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE MOTION FOR BELATED
APPEAL [CIRCUIT COURT OF
CRAIGHEAD COUNTY, EASTERN
DISTRICT, CR 2005-513, HON. PAM
HONEYCUTT, JUDGE]

REMANDED.

PER CURIAM

On May 18, 2006, petitioner Elliot Finch was found guilty by a jury of two counts of kidnapping, theft of property, aggravated assault on a family or household member, first-degree terroristic threatening, and second-degree domestic battering. An aggregate sentence of 180 months' imprisonment was imposed. Petitioner was represented at trial by his retained attorney W. Ray Nickle. No appeal was taken from the judgment of conviction, which was entered on May 19, 2006, and petitioner now seeks to proceed with a belated appeal pursuant to Ark. R. App. P.–Crim. 2(e), which permits a belated appeal in a criminal case in some instances. Petitioner contends that he asked Mr. Nickle to file an appeal from the judgment after he was sentenced.

It is the practice of this court when a pro se motion for belated appeal is filed, in which the petitioner contends that he made a timely request to appeal, and the record does not contain an order relieving trial counsel, to request an affidavit from the trial attorney in response to the allegations

in the motion. There is no order relieving Nickle in the record filed with the motion. The affidavit requested of trial counsel is required because Ark. R. App. P.–Crim. 16 provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period allowed for filing a notice of appeal under Ark. R. App. P.–Crim. 2(a)(4). *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (per curiam); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (per curiam).

Nickle in his affidavit states that he discussed whether to appeal with petitioner and his family and the decision was eventually reached that an appeal would not be pursued. He further states that he later represented petitioner with respect to a negotiated plea of guilty in a second case, CR 2005-480, and that “it was a specific part of the plea agreement “ that the sentence in CR 2005-480 would run concurrently to the sentence in CR 2005-513 and that there would be no appeal in CR 2005-513.

Petitioner’s and counsel’s claims pertaining to whether petitioner advised counsel that he desired counsel to appeal the judgment in CR 2005-513 are in direct conflict. Because the proper disposition of the motion for belated appeal in this case requires findings of fact which must be made in the trial court, we remand this matter to the circuit court for an evidentiary hearing on the issue of whether counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal. The trial court is directed to enter Findings of Fact and Conclusions of Law within ninety days and submit the findings and conclusions to this court with the transcript

of the evidentiary hearing.

Remanded.